

1 David L. Sobel (*pro hac vice*)
2 *sobel@eff.org*
3 ELECTRONIC FRONTIER FOUNDATION
4 1875 Connecticut Ave. NW
5 Suite 650
6 Washington, DC 20009
7 Telephone: (202) 797-9009 x104
8 Facsimile: (202) 707-9066

9 Kurt Opsahl (191303)
10 *kurt@eff.org*
11 Marcia Hofmann (250087)
12 *marcia@eff.org*
13 ELECTRONIC FRONTIER FOUNDATION
14 454 Shotwell Street
15 San Francisco, CA 94110
16 Telephone: (415) 436-9333 x116
17 Facsimile: (415) 436-9993

18 Attorneys for Plaintiff
19 ELECTRONIC FRONTIER FOUNDATION

20
21
22
23
24
25
26
27
28
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION,)	NO. C 07-5378 SI
)	
Plaintiff,)	NOTICE OF MOTION AND MOTION
)	FOR AN AWARD OF ATTORNEY'S
v.)	FEES AND COSTS; MEMORANDUM OF
)	POINTS AND AUTHORITIES IN
OFFICE OF THE DIRECTOR OF NATIONAL)	SUPPORT OF MOTION FOR AN
INTELLIGENCE,)	AWARD OF ATTORNEY'S FEES AND
)	COSTS
Defendant.)	

Date: May 16, 2008
Time: 9:00 a.m.
Courtroom: 10, 19th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS.....	2
III. ARGUMENT.....	4
A. Plaintiff Meets the FOIA’s Standard for Awarding Reasonable Attorney’s Fees and Costs.	4
B. EFF Is Eligible for an Award of Attorney’s Fees and Costs Because It Has Substantially Prevailed in This Action.....	5
C. EFF is Entitled to an Award of Attorney’s Fees Because EFF is a Nonprofit Organization That Sought Government Information to Inform the Public Debate About Amending Federal Surveillance Law, and ODNI Had No Reasonable Basis for Failing to Process EFF’s FOIA Requests in an Expedited Manner.	7
1. EFF’s Action Benefited the Public Because EFF Disseminated Government Information Broadly and Helped to Inform the Public Debate About Whether Telecommunications Carriers Should Be Held Accountable For Facilitating Unlawful Government Surveillance.	8
2. EFF Has Derived No Commercial Benefit From The Speedy Release of the Records, but Rather Obtained the Material to Serve a Public Interest-Oriented Purpose.	10
3. The Government’s Refusal to Process EFF’s Requests Expeditiously Was Unreasonable and Unjustified.....	11
D. The Fees EFF Seeks Are Reasonable.....	12
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

CASES

<i>ACLU v. Dep't of Justice</i> , 321 F. Supp. 2d 24 (D.D.C. 2004)	12
<i>Apple v. Does</i> (Santa Clara Superior Ct., Case No. 1-04-CV-032178)	13
<i>Barjon v. Dalton</i> , 132 F.3d 496 (9th Cir. 1997)	12
<i>Blue v. Bureau of Prisons</i> , 570 F.2d 529 (5th Cir. 1978)	8, 10
<i>Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources</i> , 532 U.S. 598 (2001)	4
<i>Chalmers v. Los Angeles</i> , 796 F.2d 1210 (9th Cir. 1986)	12
<i>Church of Scientology of Cal. v. United States Postal Service</i> , 700 F.2d 486 (9th Cir. 1983)	passim
<i>Cuneo v. Rumsfeld</i> , 553 F.2d 1360 (D.C. Cir. 1977)	5, 11
<i>Edmonds v. FBI</i> , 417 F.3d 1319 (D.C. Cir. 2005)	6
<i>Elec. Frontier Foundation v. Office of the Director of National Intelligence</i> , No. 07-5278 SI, 2007 WL 4203311, 2007 U.S. Dist. LEXIS 89585 (N.D. Cal. Nov. 27, 2007)	passim
<i>Elec. Privacy Info. Ctr. v. Dep't of Justice</i> , 416 F. Supp. 2d 24 (D.D.C. 2006)	12
<i>Exner v. FBI</i> , 443 F. Supp. 1349 (S.D. Cal. 1978), <i>aff'd</i> , 612 F.2d 1202 (9th Cir. 1980)	passim
<i>Gerstein v. CIA</i> , No. C-06-4643 MMC, 2006 WL 3462658, 2006 U.S. Dist. LEXIS 89847 (N.D. Cal. Nov. 29, 2006)	12
<i>Gerstein v. CIA</i> , No. C-06-4643 MMC, 2006 WL 3462659, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov. 29, 2006)	11-12
<i>Hensley v. Eckhart</i> , 461 U.S. 424 (1983)	5, 12
<i>In re Sony BMG CD Technologies Litigation</i> (S.D.N.Y. Case No 1:05-cv-09575-NRB)	13
<i>Kerr v. Screen Extras Guild, Inc.</i> , 526 F.2d 67 (9th Cir. 1975)	12, 13
<i>Long v. United States IRS</i> , 932 F. 2d 1309 (9th Cir. 1991)	6, 7, 12
<i>O'Neill, Lysaght & Sun v. DEA</i> , 951 F. Supp. 1413 (C.D. Cal. 1997)	13
<i>OPG v. Diebold</i> , 337 F. Supp. 2d 1195 (N.D. Cal. 2004)	13
<i>Poulsen v. U.S. Customs and Border Protection</i> , No. 06-1743 SI, 2007 WL 160945, 2007 U.S. Dist. LEXIS 8488 (N.D. Cal. Jan. 17, 2007)	4, 7, 10, 12
<i>Powell v. Dep't of Justice</i> , 569 F. Supp. 1192 (N.D. Cal. 1983)	6, 12

1	<i>Seegull Mfg. Co. v. NLRB</i> , 741 F.2d 882 (6th Cir. 1984)	8
2	<i>Wishart v. Commissioner ex rel. United States</i> , No. 97-20614 SW, 1998 WL 667638, 1998 U.S.	
3	Dist. LEXIS 13306 (N.D. Cal. Aug. 6, 1998)	10, 11

4 STATUTES

5	32 C.F.R. § 1700.12(c)(2)	9
6	5 U.S.C. § 552(a)(4)(E)	5
7	5 U.S.C. § 552(a)(4)(E)(i)	4
8	5 U.S.C. § 552(a)(4)(E)(ii)(I)	4, 7
9	5 U.S.C. § 552(a)(4)(E)(ii)(II)	4
10	5 U.S.C. § 552(a)(6)(E)(v)(II)	9
11	Fed. R. Civ. P. 54(d)	1
12	Freedom of Information Act (“FOIA”), 5 U.S.C. § 552	1
13	OPEN Government Act, Pub. L. No. 110-175, § 4, 121 Stat. 2524 (2007)	4

14 OTHER AUTHORITIES

15	Bob Egelko, “AT&T Case Lobbying Yields Just One Document, Federal Spy Chief Says,” SAN	
16	FRANCISCO CHRONICLE, Dec. 12, 2007	3-4
17	Declan McCullagh, “Declassified Docs Show Fight Over Surveillance, Telecom Immunity,” CNET	
18	NEWS, Dec. 11, 2007	4
19	Press Release, Elec. Frontier Foundation, EFF Obtains Documents Detailing High-Level Battles	
20	Over Surveillance Law (Nov. 30, 2007)	3
21	Press Release, Elec. Frontier Foundation, EFF Obtains Documents on Congressional Intelligence	
22	Briefings (Dec. 11, 2007)	3
23	Ryan Singel, “Top Spy Chief Pushed Congress For Wider Powers, Citing High Summer Threat	
24	Level, Docs Show,” THREAT LEVEL, WIRED NEWS, Nov. 30, 2007	4

23 LEGISLATIVE MATERIALS

24	H. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974)	8
25	S. Rep. No. 110-59, 110th Cong., 1st Sess. (2007)	4
26	S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974)	passim

1 TO DEFENDANT AND ITS COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on May 16, 2008, or as soon thereafter as the matter may be
3 heard in Courtroom 10 on the 19th Floor of the United States District Court for the Northern
4 District of California, 450 Golden Gate Avenue, San Francisco, California, Plaintiff Electronic
5 Frontier Foundation (“EFF”) will, and hereby does, move for an order awarding attorney’s fees and
6 costs.

7 Pursuant to Fed. R. Civ. P. 54(d) and the Freedom of Information Act (“FOIA”), 5 U.S.C. §
8 552, EFF seeks to recover attorney’s fees and costs expended to initiate this action, obtain an order
9 to enforce EFF’s statutory right to the expedited processing of two FOIA requests submitted to the
10 Office of the Director of National Intelligence (“ODNI”), and prepare this motion and
11 accompanying papers. This motion is based on this notice of motion, the memorandum of points
12 and authorities in support of this motion, the declarations and attached exhibits in support of this
13 motion, and all papers and records on file with the Clerk or which may be submitted prior to or at
14 the time of the hearing, and any further evidence which may be offered.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 In this action under the FOIA, EFF sought the expedited processing and release of records
18 held by ODNI concerning the efforts of the agency and telecommunications carriers to campaign
19 for changes to federal surveillance law, particularly to ensure that the carriers are not held
20 accountable for their role in the government’s unlawful surveillance of millions of Americans.
21 Following its successful motion for a preliminary injunction, EFF now moves for an award of
22 attorney’s fees and costs.¹

23
24
25 ¹ On March 5, 2008, the Court entered an order approving a stipulated briefing and hearing
26 schedule by which EFF was required to move for attorney’s fees no later than April 11, 2008. (Dkt.
27 No. 46.) On April 1, 2008, ODNI filed a stipulation in which the parties proposed a revised
28 schedule requiring EFF to move for attorney’s fees no later than May 9, 2008. (Dkt. No. 47.) As of
the filing of this motion, the Court has not approved the April 1 stipulation. Accordingly, EFF has
filed this motion in conformance with the schedule ordered by the Court on March 5, 2008.

II. STATEMENT OF FACTS

The Electronic Frontier Foundation is a nonprofit, member-supported civil liberties organization working to protect rights in the digital world. Among other activities, EFF conducts the FOIA Litigation for Accountable Government (“FLAG”) Project, which obtains government records about national security and technology-related matters and make them widely available to the public.

As part of the FLAG Project, EFF sent two letters to ODNI on August 31, 2007, requesting under the FOIA all records from April 2007 to August 31, 2007 concerning briefings, discussions, or other exchanges that ODNI Director Michael McConnell or other agency officials have had concerning amendments to the Foreign Intelligence Surveillance Act (“FISA”) with (a) representatives of telecommunications companies, and (b) members of the Senate or House of Representatives, including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities. Exs. K & L to Hofmann Decl. in Support of Mot. Prelim. Inj. (Dkt. No. 7). EFF asked that these requests be processed in an expeditious manner pursuant to the FOIA and agency regulations because they involve a matter about which there is “[a]n urgency to inform the public about an actual or alleged federal government activity,” and were “made by a person primarily engaged in disseminating information.” Exs. K & L to Hofmann Decl. in Support of Mot. Prelim. Inj. (Dkt. No. 7).

By two facsimiles sent September 10, 2007, ODNI informed EFF that its requests for expedited processing had been granted. Exs. M & N to Hofmann Decl. in Support of Mot. Prelim. Inj. (Dkt. No. 7). However, ODNI did not complete the processing of EFF’s requests within the statutory deadline set forth by the FOIA. Accordingly, EFF initiated this action on October 17, 2007, seeking the expedited processing and release of the requested documents. *See* Compl. (Dkt. No. 1).

After filing the complaint, EFF contacted counsel for ODNI on numerous occasions to try to negotiate a mutually acceptable processing schedule for EFF’s requests, but these overtures were unsuccessful. Hofmann Decl. in Support of App. For Order Shortening Time for Hearing on Mot.

1 Prelim. Inj. ¶¶ 5-9 (Dkt. 11). As a result, on October 29, 2007, EFF filed a motion for a
 2 preliminary injunction to compel the timely processing and production of the records. *See* Mot.
 3 Prelim. Inj. (Dkt. No. 6). In its opposition to the motion, the government offered to provide an
 4 interim release of records to EFF on November 30, 2007, and complete the processing of EFF's
 5 requests by December 31, 2007. Def. Opp. Mot. Prelim. Inj. at 6 (Dkt. No. 22). However, on
 6 November 27, 2007, this Court issued an order granting in part and denying in part EFF's motion
 7 for a preliminary injunction. *Elec. Frontier Foundation v. Office of the Director of National*
 8 *Intelligence*, No. 07-5278 SI, 2007 WL 4203311, 2007 U.S. Dist. LEXIS 89585 (N.D. Cal. Nov.
 9 27, 2007) (Dkt. No. 26). Specifically, the Court ordered ODNI to "respond to plaintiff's FOIA
 10 request and provide an interim release no later than November 30, 2007," and to "provide a final
 11 release of all responsive, non-exempt documents no later than December 10, 2007." *Id.* at *23.
 12 The Court also ordered ODNI to provide EFF an "affidavit with its final response setting forth the
 13 basis for withholding any responsive documents it does not release." *Id.*

14 On November 30, 2007, ODNI released to EFF a total of 242 pages, 230 of which were
 15 disclosed in full, and 12 withheld in part. ODNI provided its second disclosure to EFF on
 16 December 10, 2007, as well as the affidavit required by the Court explaining the grounds for the
 17 agency's withholdings. In ODNI's December 10 release, the agency disclosed 238 pages in full,
 18 withheld 29 pages in part, and withheld 14 pages in full.²

19 EFF made all records released through this action available to the public on its web site at
 20 <http://www.eff.org/issues/foia/cases/C-07-05278>, and publicized the availability of the material
 21 through press releases. Press Release, Elec. Frontier Foundation, EFF Obtains Documents
 22 Detailing High-Level Battles Over Surveillance Law (Nov. 30, 2007) (attached to Hofmann Decl.
 23 as Ex. A); Press Release, Elec. Frontier Foundation, EFF Obtains Documents on Congressional
 24 Intelligence Briefings (Dec. 11, 2007) (attached to Hofmann Decl. As Ex. B). As a result, several
 25 media outlets reported on the documents and their contents. *See* Bob Egelko, "AT&T Case

26 ² EFF chose not to challenge ODNI's claimed exemptions, and the Court approved the parties'
 27 stipulation to voluntarily dismiss this case on March 5, 2008. Order Dismissing Case (Dkt. No.
 28 46).

1 Lobbying Yields Just One Document, Federal Spy Chief Says,” SAN FRANCISCO CHRONICLE, Dec.
 2 12, 2007 (attached to Hofmann Decl. As Ex. C); Declan McCullagh, “Declassified Docs Show
 3 Fight Over Surveillance, Telecom Immunity,” CNET NEWS, Dec. 11, 2007 (attached to Hofmann
 4 Decl. As Ex. D); Ryan Singel, “Top Spy Chief Pushed Congress For Wider Powers, Citing High
 5 Summer Threat Level, Docs Show,” THREAT LEVEL, WIRED NEWS, Nov. 30, 2007 (attached to
 6 Hofmann Decl. as Exhibit E). ODNI also posted the records released to EFF on the agency’s own
 7 web site. See Office of the Director of National Intelligence, Electronic Reading Room,
 8 http://www.odni.gov/electronic_reading_room/electronic_reading_room.htm (last visited April 9,
 9 2008) (attached to Hofmann Decl. as Exhibit F).

10 **III. ARGUMENT**

11 **A. Plaintiff Meets the FOIA’s Standard for Awarding Reasonable Attorney’s 12 Fees and Costs.**

13 The FOIA provides, in pertinent part, that “[t]he court may assess against the United States
 14 reasonable attorney fees and other litigation costs reasonably incurred in any case under this
 15 section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i). The
 16 statute explains that the complainant has “substantially prevailed” where it “has obtained relief
 17 through either a judicial order, or an enforceable written agreement or consent decree; or a
 18 voluntary or unilateral change in position by the agency, if the complainant's claim is not
 19 insubstantial.” 5 U.S.C. § 552(a)(4)(E)(ii)(I)-(II).³ See also *Church of Scientology of Cal. v. United*

20 ³ As the OPEN Government Act of 2007 recently made clear, a complainant may substantially
 21 prevail even when a court does not issue an order granting relief in the complainant’s favor. Pub. L.
 22 No. 110-175, § 4, 121 Stat. 2524 (2007). This amendment “responds to the Supreme Court’s
 23 holding in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep’t of Health and Human*
 24 *Resources*, 532 U.S. 598 (2001), which eliminated the ‘catalyst theory’ of attorney fee recovery
 25 under certain civil rights laws. . . . This section clarifies that *Buckhannon*’s holding does not and
 26 should not apply to FOIA litigation.” S. Rep. No. 110-59, 110th Cong. 1st Sess. 6 (2007). Much
 27 of the recent case law on awarding attorney’s fees in FOIA actions has been based on the
 28 *Buckhannon* approach. See, i.e., *Poulsen v. U.S. Customs and Border Protection*, No. 06-1743 SI,
 2007 WL 160945, 2007 U.S. Dist. LEXIS 8488, at *3 (N.D. Cal. Jan. 17, 2007). However, the
 Court need not be concerned about how those past analyses square with this matter. EFF’s
 eligibility for attorney’s fees is based on a court order requiring ODNI to process EFF’s requests by
 a date certain, not a voluntary change in the agency’s position. Thus, EFF has substantially
 prevailed regardless of whether *Buckhannon* applies to FOIA cases.

1 *States Postal Service*, 700 F.2d 486, 489 (9th Cir. 1983) (“If the facts show that the plaintiff has
 2 substantially prevailed on his or her FOIA action, then such party is eligible for an award of
 3 attorney’s fees.”)

4 The legislative history of 5 U.S.C. § 552(a)(4)(E) shows that Congress intended the
 5 provision of attorney’s fees to encourage private citizens to challenge the wrongful withholding of
 6 government records where it might otherwise be cost-prohibitive to do so. S. Rep. No. 93-854, 93d
 7 Cong., 2d Sess. 17 (1974). “Congress realized that too often the insurmountable barriers presented
 8 by court costs and attorney fees to the average person requesting information under the FOIA
 9 enabled the government to escape compliance with the law.” *Cuneo v. Rumsfeld*, 553 F.2d 1360,
 10 1364-65 (D.C. Cir. 1977). The provision was also meant to punish agencies that assume
 11 recalcitrant positions against requesters without reasonable basis. S. Rpt. No. 93-854 at 17 (“[I]f
 12 the government had to pay legal fees each time it lost a case . . . it would be much more careful to
 13 oppose only those areas it had strong chance of winning.”) (citation omitted).

14 The Ninth Circuit has adopted a two-step approach to determine whether a complainant
 15 should be awarded fees and costs under 5 U.S.C. § 552(a)(4)(E). First, the complainant must
 16 demonstrate that it is eligible to recover fees by showing that it has substantially prevailed. *Church*
 17 *of Scientology*, 700 F.2d at 489; *see also Exner v. FBI*, 443 F. Supp. 1349, 1354 (S.D. Cal. 1978),
 18 *aff’d*, 612 F.2d 1202 (9th Cir. 1980) (This standard “does not require complete success. It requires
 19 only that the complainant substantially prevail.”) Once the complainant has satisfied this
 20 threshold, the Court may exercise its discretion to decide that the complainant is entitled to
 21 attorney’s fees. *Church of Scientology*, 700 F.2d at 492. The Court calculates a reasonable fee
 22 award based on a lodestar figure, which is the number of attorney hours reasonably spent on the
 23 matter multiplied by the lawyers’ reasonable hourly rates. *Hensley v. Eckhart*, 461 U.S. 424, 433
 24 (1983).

25 **B. EFF Is Eligible for an Award of Attorney’s Fees and Costs Because It Has**
 26 **Substantially Prevailed in This Action.**

27 The Ninth Circuit has found that “[t]o be eligible for an award of attorney’s fees in a FOIA
 28 suit, the plaintiff must present convincing evidence that two threshold conditions have been

1 satisfied. The plaintiff must show that: (1) the filing of the action could reasonably have been
 2 regarded as *necessary* to obtain the information; and (2) the filing of the action had a *substantial*
 3 *causative* effect on the delivery of the information.” *Church of Scientology*, 700 F.2d at 489 (citing
 4 *Exner*, 443 F. Supp. at 1353) (emphases in original); *Long v. United States IRS*, 932 F. 2d 1309,
 5 1313 (9th Cir. 1991) (per curiam).

6 A plaintiff may substantially prevail in a FOIA action by obtaining a court order requiring
 7 the government to process a FOIA request on an expedited basis. *Exner*, 443 F. Supp. at 1353
 8 (“[*W*]hen information is delivered may be as important as *what* information is delivered. The
 9 purpose of this suit was the *immediate* production of documents and plaintiff accomplished this
 10 goal.”) (emphases in original). *See also Edmonds v. FBI*, 417 F.3d 1319, 1324 (D.C. Cir. 2005)
 11 (holding that a complainant substantially prevailed where she secured a court order compelling the
 12 government to process a request expeditiously, and stating, “[p]lainly, there is a value to obtaining
 13 something earlier than one otherwise would.”).

14 EFF has substantially prevailed because the filing of this action (1) was necessary to obtain
 15 the information EFF requested under the FOIA in a timely manner, and (2) had a substantial
 16 causative effect on the delivery of the information. As EFF explained in its motion for a
 17 preliminary injunction, ODNI granted expedited processing for EFF’s requests, but failed to
 18 comply with its statutory obligation to process the information in a timely manner. Mot. Prelim.
 19 Inj. at 12-13. EFF made repeated attempts to negotiate a mutually agreeable processing schedule
 20 with the government, the failure of which prompted EFF to seek preliminary relief from the Court.
 21 Hofmann Decl. in Support of Mot. Prelim. Inj. ¶ 17 (Dkt. No. 7). It is clear that the government
 22 would not have processed EFF’s requests in a timely fashion without the threat and ultimate
 23 issuance of the Court’s order. *See Powell v. Dep’t of Justice*, 569 F. Supp. 1192, 1200-01 (N.D.
 24 Cal. 1983) (finding the complainant’s action necessary when needed “to a secure the release of the
 25 requested documents within a period of time even remotely approaching the statutorily mandated
 26 periods.”)

27 Furthermore, EFF’s action directly caused ODNI to process EFF’s requests expeditiously
 28

1 and release non-exempt information. EFF successfully obtained a court order on November 27,
 2 2007 requiring ODNI to “respond to plaintiff’s FOIA request and provide an interim release no
 3 later than November 30, 2007,” and to “provide a final release of all responsive, non-exempt
 4 documents no later than December 10, 2007.” *Elec. Frontier Foundation*, No. 07-5278 SI, 2007
 5 U.S. Dist. LEXIS 89585, at *23. It was only as a result of this order that the agency processed 523
 6 records, releasing 509 in part or full, on or before December 10, 2007.

7 Thus, EFF “obtained relief through . . . a judicial order” as provided in 5 U.S.C. §
 8 552(a)(4)(E)(ii)(I), which was not only necessary to compel the government to process the records
 9 expeditiously, but by its very terms forced ODNI to process and deliver the requested information
 10 to EFF. Furthermore, this result constituted a substantial amount of the relief EFF sought in its
 11 complaint. Compl. at 7 ¶¶ A & B (Dkt. No. 1) (asking the Court to order ODNI “to process
 12 immediately the requested records in their entirety” and “upon completion of such expedited
 13 processing, to disclose the requested records in their entirety and make copies available to
 14 Plaintiff.”). Thus, EFF substantially prevailed on its complaint and motion for a preliminary
 15 injunction.

16 **C. EFF is Entitled to an Award of Attorney’s Fees Because EFF is a Nonprofit**
 17 **Organization That Sought Government Information to Inform the Public**
 18 **Debate About Amending Federal Surveillance Law, and ODNI Had No**
Reasonable Basis for Failing to Process EFF’s FOIA Requests in an Expedited
Manner.

19 Once a complainant demonstrates that it has substantially prevailed on its claims, the Court
 20 next considers whether the complainant is entitled to an award of attorney’s fees. *Church of*
 21 *Scientology*, 700 F.2d at 492; *Long*, 932 F. 2d at 1313; *Poulsen*, No. 06-1743 SI, 2007 U.S. Dist.
 22 LEXIS 8488, at **5-6. “Entitlement is left to the Court’s discretion.” *Church of Scientology*, 700
 23 F.2d at 490.

24 The Court balances the following factors to determine whether a complainant is entitled to
 25 recover its attorney’s fees and litigation costs: (1) the benefit to the public, if any, deriving from the
 26 case; (2) the commercial benefit to the complainant; (3) the nature of the complainant’s interest in
 27 the records sought; and (4) whether the government’s withholding of the records sought had a
 28

1 reasonable basis in law. *Church of Scientology*, 700 F.2d at 492; *see also Long*, 932 F.2d at 1313;
 2 *Poulsen*, No. 06-1743 SI, 2007 U.S. Dist. LEXIS 8488, at *6. This list is non-exclusive, and the
 3 Court may weigh “whatever factors it deems relevant in determining whether an award of
 4 attorney’s fees is appropriate.” *Church of Scientology*, 700 F.2d at 492 (quoting *Exner*, 443 F.
 5 Supp. at 1352).⁴ As explained below, all these factors favor an award of attorney’s fees in this
 6 case.

7 1. EFF’s Action Benefited the Public Because EFF Disseminated Government
 8 Information Broadly and Helped to Inform the Public Debate About
 9 Whether Telecommunications Carriers Should Be Held Accountable For
 10 Facilitating Unlawful Government Surveillance.

11 The first criterion supports an award of attorney’s fees and costs where there is a benefit to
 12 the public resulting from the plaintiff’s successful litigation of its case. The Court should take into
 13 account whether the “complainant’s victory is likely to add to the fund of information that citizens
 14 may use in making vital political choices.” *Blue v. Bureau of Prisons*, 570 F.2d 529, 534 (5th Cir.
 15 1978). The legislative history plainly contemplates that obtaining information for publication or to
 16 advance the public interest would satisfy this factor: “[u]nder the first criterion a court would
 17 award attorney’s fees, for example, where a newsman was seeking information to be used in a
 18 publication or *a public interest group was seeking information to further a project benefiting the*
 19 *general public.*” S. Rep. No. 93-854 at 19 (emphasis added).⁵ The legislative history also
 20 “strongly suggest[s] that in weighing this factor a court should taken into account the degree of
 dissemination and likely public impact that might be expected from a particular disclosure.” *Blue*,

21 ⁴ The FOIA itself does not list these four factors, which were included in the Senate’s version of
 22 the legislation that ultimately added the attorney’s fee provision to the statute. As *Exner* explains,
 23 “The compromise bill which emerged from conference retained the ‘substantially prevailed’
 24 language of the Senate bill but eliminated the four criteria [to determine entitlement to fees].
 Although the conferees did not wish to preclude the courts from taking such criteria into
 25 consideration, they believed the courts should not be limited to these criteria in exercising their
 discretion. *Exner*, 443 F. Supp. 1349 at 1352 (citing H. Rep. No. 93-1380, 93d Cong., 2d Sess. 9
 (1974)).

26 ⁵ The courts have taken an expansive view of this factor, even finding that the “vindication of the
 27 [FOIA] itself” may be sufficient to satisfy the standard. *Seegull Mfg. Co. v. NLRB*, 741 F.2d 882,
 886 n.1 (6th Cir. 1984).

1 570 F.2d at 534, cited approvingly by *Church of Scientology*, 700 F.2d at 493.

2 EFF has delivered these public benefits. EFF has made all records released by ODNI
3 through this action available to the public on its web site and publicized the availability of the
4 material through press releases. *See* Hofman Decl. Exh. A & B. As a result, several media outlets
5 reported on the documents and their contents. *See* Hofman Decl. Exh. C, D & E. Indeed, ODNI
6 even posted the records released to EFF on its own web site, thus voluntarily disseminating the
7 information to the public through another channel. *See* Hofmann Decl. Exh. F. If EFF had not
8 requested the information, there is no reason to believe that it would have been collected, reviewed,
9 and made publicly available by the government.

10 Furthermore, EFF provided a public benefit by compelling the immediate production of
11 documents, which “establish[ed] the principle that there are some exceptional cases where the
12 government must specifically process requests for information on a priority basis. In effect,
13 plaintiff acted as a private attorney general in vindicating an important public policy.” *Church of*
14 *Scientology*, 700 F.2d at 493 (quoting *Exner*, 443 F. Supp. at 1353). EFF requested that ODNI
15 process EFF’s requests expeditiously because they concerned a matter about which there was “[a]n
16 urgency to inform the public about an actual or alleged Federal Government activity,” and were
17 “made by a person primarily engaged in disseminating information,” as provided in 5 U.S.C. §
18 552(a)(6)(E)(v)(II) and 32 C.F.R. § 1700.12(c)(2). Exh. K & L to Hofmann Decl. in Support of
19 Mot. Prelim. Inj. (Dkt. No. 7). The government conceded that there was an urgency to inform the
20 public about telecommunications carriers’ efforts to ensure they are not held accountable for
21 participating in unlawful government activities, and purported to grant EFF’s requests for
22 expedited processing. Exh. M & N to Hofmann Decl. in Support of Mot. Prelim. Inj. (Dkt. No. 7).
23 However, it was only after the Court issued a preliminary injunction that the government actually
24 processed the documents and released the non-exempt portions to EFF and the public in a timely
25 manner. *Elec. Frontier Foundation*, No. 07-5278 SI, 2007 U.S. Dist. LEXIS 89585, at *22
26 (granting EFF’s motion for a preliminary injunction and “requiring defendant to *comply with the*
27 *law and process plaintiff’s FOIA requests within ten days of this order.*”) (emphasis added).

Thus, EFF's action resulted in the dissemination of information that contributed to the public debate about whether telecommunications carriers should be held responsible for their participation in a massive, well-documented government surveillance program. EFF's lawsuit also vindicated the central purpose of the FOIA by forcing the government to carry out its statutory obligations and process EFF's requests in an expedited manner. Accordingly, the Court should award EFF its attorney's fees and costs because EFF's action has undeniably served to benefit the public.

2. EFF Has Derived No Commercial Benefit From The Speedy Release of the Records, but Rather Obtained the Material to Serve a Public Interest-Oriented Purpose.

The second and third criteria, which the Ninth Circuit has considered jointly, are the commercial benefit to the complainant and the nature of the complainant's interest in the records. *Church of Scientology*, 700 F.2d 486 at 494. The FOIA clearly contemplates that nonprofit organizations with no commercial benefit in the information they request should recover attorney's fees and costs pursuant to the statute. As the legislative history explains, "a court would usually allow recovery of fees where the complainant was indigent or a nonprofit public interest group" rather than "a large corporate interest." S. Rep. No. 93-854 at 19.⁶ *See also Blue*, 570 F.2d at 534 (the legislative history "shows a preference for public interest groups, indigents and disinterested scholars over private commercial enterprises' efforts for disclosure."). The Ninth Circuit has concluded likewise: "where plaintiff is indigent or a nonprofit public interest group, an award of attorney's fees furthers the FOIA policy of expanding access to government information." *Church of Scientology*, 700 F.2d at 494.

With respect to the requester's interest in government records, the legislative history has similarly noted, "a court would generally award fees if the complainant's interest in the information sought was scholarly or journalistic or public-interest oriented, but would not do so if his interest was of a frivolous or purely commercial nature." S. Rep. No. 93-854 at 19; *see also*

⁶ The legislative history also makes clear that "[f]or the purposes of applying this criterion, news interests should not be considered commercial interests." *Id.*

1 *Poulsen*, No. 06-1743 SI, 2007 U.S. Dist. LEXIS 8488, at *8 (quoting the legislative history);
 2 *Wishart v. Commissioner ex rel. United States*, No. 97-20614 SW, 1998 WL 667638, 1998 U.S.
 3 Dist. LEXIS 13306, at *22 (N.D. Cal. Aug. 6, 1998) (denying costs where complainant had “a
 4 private, purely commercial interest, as opposed to a scholarly, journalistic, or public interest.”)

5 EFF is precisely the sort of requester that Congress intended to recover attorney’s fees
 6 under the FOIA. EFF is a nonprofit, member-supported civil liberties organization working to
 7 protect rights in the digital world. EFF has derived no commercial benefit from the requested
 8 information. Furthermore, EFF’s interest in seeking the records at issue in this case was public
 9 interest-oriented. EFF initiated this action to obtain the timely release of government information
 10 relevant to a contentious debate of national importance about whether telecommunications carriers
 11 should be given legal immunity for their role in highly controversial government surveillance
 12 activity. These factors strongly favor an award of attorney’s fees and costs.

13 3. The Government’s Refusal to Process EFF’s Requests Expeditiously Was
 14 Unreasonable and Unjustified.

15 The final factor requires the Court to consider whether the agency’s withholding had a
 16 reasonable basis in the law. This factor weigh in favor of recovery of attorney’s fees because
 17 ODNI did not have a reasonable basis for its position and has been “recalcitrant in its opposition to
 18 a valid claim or otherwise engaged in obdurate behavior.” *Cuneo*, 552 F.2d 1366; *see also*
 19 *Wishart*, No. 97-20614 JW, 1998 U.S. Dist. LEXIS 13306, at *23. According to the FOIA’s
 20 legislative history, “a court would not award fees where the government’s withholding had a
 21 colorable basis in law but would ordinarily award them if the withholding appeared to be merely to
 22 avoid embarrassment or frustrate the requester.” S. Rep. No. 93-854 at 19.

23 As the Court found in its November 27, 2007 order, ODNI’s failure to make the records
 24 promptly available to EFF had no basis in the law. *Elec. Frontier Foundation*, No. 07-5278 SI,
 25 2007 U.S. Dist. LEXIS 89585, at **17-18 (“Plaintiff is correct that defendant has failed to provide
 26 the Court with specific information that might explain why it will require *four months* to process
 27 approximately 250 pages of unclassified material and approximately sixty-five pages of classified
 28 material identified as responsive to the FOIA requests.”) (emphasis in original) (internal quotation

marks omitted). To justify its conduct, the government offered arguments that have been weighed and firmly rejected by courts time and time again. *See, e.g., Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462659, 2006 U.S. Dist. LEXIS 89883 (N.D. Cal. Nov. 29, 2006); *Gerstein v. CIA*, No. C-06-4643 MMC, 2006 WL 3462658, 2006 U.S. Dist. LEXIS 89847 (N.D. Cal. Nov. 29, 2006); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 24 (D.D.C. 2006); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004). Much like the defendant agency in *Powell*, ODNI failed to offer "any plausible basis for its 'foot-dragging' in releasing these documents, especially in light of the clear congressional intent for prompt and efficient dissemination under the [FOIA]." *Powell*, 569 F. Supp. at 1201. Accordingly, ODNI's failure to comply with the statute's requirements was without reasonable basis.

D. The Fees EFF Seeks Are Reasonable.

Once the Court has determined that the complainant is both eligible and entitled to attorney's fees, the Court has discretion only to determine the reasonableness of the amount sought. *Long*, 932 F.2d 1314. To obtain fees, a plaintiff must submit a lodestar figure representing the number of attorney hours reasonably expended on the matter multiplied by each attorney's reasonable hourly rate. *Hensley*, 461 U.S. at 430; *Poulsen*, No. 06-1743 SI, U2007 U.S. Dist. LEXIS 8488, at *9. There is a "strong presumption" that the lodestar is reasonable if the Court finds that the hours expended and corresponding rates are both reasonable. *Long*, 932 F.2d at 1314. The proper hourly rate is the "rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Barjon v. Dalton*, 132 F.3d 496, 502 (9th Cir. 1997) (quoting *Chalmers v. Los Angeles*, 796 F.2d 1210-11 (9th Cir. 1986)). The Court may adjust the lodestar in its discretion for various reasons including "time spent by attorney; novelty and complexity of the issues presented; level of skill required; customary fee charged by attorney or firm; experience, reputation, and ability of attorney; and awards in similar cases." *Exner*, 443 F. Supp. at 1254; *Powell*, 569 F. Supp. at 1202.⁷ The cost of litigating a FOIA request

⁷ The Ninth Circuit has identified a total of twelve factors that may be relevant to a Court's determination of a reasonable fees award. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975). These considerations are:

may increase when the government prolongs an action by refusing to comply with the law's requirements. *See, e.g., O'Neill, Lysaght & Sun v. DEA*, 951 F. Supp. 1413, 1413 (C.D. Cal. 1997) (agency's "recalcitrance and resistance" responsible for litigation taking longer than necessary to resolve, resulting in substantial attorney's fee award).

EFF should be awarded attorney's fees because it prevailed on its motion for preliminary injunction, and expeditious processing and release of records was the basis of EFF's complaint. EFF's attorneys seek compensation only for the time and costs expended to initiate this action, secure a favorable order on the motion for preliminary injunction, and seek attorney's fees, and the amount of time spent by EFF attorneys on these aspects of the litigation have been reasonable. Hofmann Decl. ¶ 13.

EFF's billable rates are also reasonable, and are well within the prevailing hourly rates in the San Francisco Bay Area for lawyers of comparable education, expertise, and experience who handle matters of the type involved in this litigation. Sobel Decl. at ¶ 5; Granick Decl. ¶ 5; Opsahl Decl. ¶ 6; Hofmann Decl. ¶ 5. Indeed, EFF has been paid attorney's fees at its prevailing hourly rates in other cases. Opsahl Decl. ¶ 5. For instance, in *Apple v. Does* (Santa Clara Superior Ct., Case No. 1-04-CV-032178), EFF was awarded attorney's fees in accordance with their lawyers' 2006 and 2007 rates. *Id.* In *In re Sony BMG CD Technologies Litigation* (S.D.N.Y. Case No 1:05-cv-09575-NRB), EFF attorneys were paid fees at their hourly rates as part of the settlement of the action in June 2006. *Id.* Further, in *OPG v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), EFF attorneys were paid fees after a summary judgment victory at the organization's 2004 hourly rates.

(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Id. The Court need only consider those factors applicable to the instant case. *Powell*, 569 F. Supp. at 1202.

1 The declarations filed with this motion attest to the skill and expertise of the attorneys who
 2 worked on this matter on EFF's behalf. David L. Sobel has been Senior Counsel to EFF since
 3 2006. Sobel Decl. at ¶ 2 & 6. He received his Juris Doctor degree from the University of Florida
 4 College of Law in 1979. Sobel Decl. at ¶ 6. Since graduation he has continuously practiced civil
 5 law, specializing in FOIA litigation. *Id.* Prior to joining EFF, Mr. Sobel was General Counsel at
 6 the Electronic Privacy Information Center ("EPIC"), where he directed the public interest
 7 organization's FOIA litigation. Sobel Decl. at ¶ 7. Prior to this case, Mr. Sobel litigated numerous
 8 FOIA cases, including many cases involving the expedited processing of FOIA requests. Sobel
 9 Decl. at ¶ 8. He was the co-editor of the 2002 and 2004 editions of *Litigation Under the Federal*
 10 *Open Government Laws*, a leading treatise on FOIA litigation. Sobel Decl. at ¶ 9. Mr. Sobel was
 11 the recipient of the American Library Association's James Madison Award in 2004 in recognition
 12 of his contribution to FOIA litigation and open government efforts, and was inducted into the First
 13 Amendment Center's National FOIA Hall of Fame in 2006. *Id.*

14 Jennifer Stisa Granick has been Director of Civil Liberties at EFF since 2007. Granick
 15 Decl. ¶ 2 & 6. In 1993, she received her Juris Doctor degree from the University of California at
 16 Hastings School of Law. Granick Decl. ¶ 6. Since graduation she has continuously practiced
 17 criminal and civil law. Granick Decl. ¶ 6. Before joining EFF, Ms. Granick was the Executive
 18 Director of the Center for Internet and Society at Stanford Law School, where she taught the
 19 Cyberlaw Clinic and Cybercrime Seminar and supervised litigation conducted by the Fair Use
 20 Project. Granick Decl. ¶ 7. Prior to this case, she co-counseled on at least two FOIA cases,
 21 including *Poulsen*, No. C-06-1743 SI (N.D. Cal. 2007). Granick Decl. ¶ 8.

22 Kurt Opsahl has been Senior Staff Attorney at EFF since 2004. Opsahl Decl. ¶ 2 & 8. In
 23 1997, he received his Juris Doctor degree from the University of California at Berkeley School of
 24 Law (Boalt Hall), where he was an editor of both the California Law Review and the Berkeley
 25 Technology Law Journal. Opsahl Decl. ¶ 7. Prior to joining EFF, he worked for the law firms of
 26 Perkins Coie LLP (1999-2004) and Severson & Werson PC (1997-1998). In addition, he was the
 27 Research Fellow to Professor Pamela Samuelson at the University of California at Berkeley,
 28

1 School of Information Management & Systems (1998-1999). Mr. Opsahl has authored more than
2 15 articles for legal publications, and was a co-editor of the *Electronic Media and Privacy Law*
3 *Handbook*. Opsahl Decl. ¶ 8. In 2007, he received a California Lawyer of the Year (CLAY)
4 Award for Media Law. Opsahl Decl. ¶ 8.

5 Marcia Hofmann has been Staff Attorney at EFF since 2006. Hofmann Decl. ¶ 2. She
6 received her Juris Doctor degree from the University of Dayton School of Law in 2003, and is
7 admitted to the bars of the District of Columbia and California. Hofmann Decl. ¶ 6. Before
8 joining EFF she was Staff Counsel and Director of the Open Government Project at EPIC, where
9 she led the public interest organization's efforts to learn about emerging policies in the post-9/11
10 era. Hofmann Decl. ¶ 7. She has litigated more than a dozen FOIA lawsuits, and documents made
11 public as a result of these cases have been reported by the *New York Times*, *Washington Post*,
12 National Public Radio, Fox News, and CNN, among others. Hofmann Decl. ¶ 8. Ms. Hofmann is
13 a co-author of *Proskauer on Privacy: A Guide to Privacy and Data Security Law in the*
14 *Information Age*, as well as a contributor to the two-volume *Encyclopedia of Privacy*, for which
15 she authored the "Freedom of Information Act" entry. Hofmann Decl. ¶ 9.

16 In total, EFF seeks \$48,520.00 in fees for the time expended by EFF attorneys on this
17 matter, as more fully detailed in the declarations accompanying this motion. Hofmann Decl. ¶ 12.
18 EFF also seeks to recover reasonable costs in the amount of \$731.97 for filing fees, mailing costs,
19 and messenger expenses. Hofmann Decl. ¶ 13.

20 //

21 //

22 //

1 **IV. CONCLUSION**

2 For the foregoing reasons, EFF's motion for an award of attorney's fees and costs should be
3 granted.

4 DATED: April 11, 2008

5 David L. Sobel (*pro hac vice*)
6 ELECTRONIC FRONTIER FOUNDATION
7 1875 Connecticut Ave. NW
8 Suite 650
9 Washington, DC 20009
10 Telephone: (202) 797-9009 x104
11 Facsimile: (202) 707-9066

12 /s/ Marcia Hofmann

13 Kurt Opsahl, Esq.
14 Marcia Hofmann, Esq.
15 ELECTRONIC FRONTIER FOUNDATION
16 454 Shotwell Street
17 San Francisco, CA 94110
18 Telephone: (415) 436-9333
19 Facsimile: (415) 436-9993

20 Attorneys for Plaintiff
21 ELECTRONIC FRONTIER FOUNDATION
22
23
24
25
26
27
28